NO. 46832-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Appellant

v.

SEAN MICHAEL TAUL, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01278-1

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

The State submits this reply brief to address some of Respondent's statements and arguments in its Response Brief. As a preliminary matter, Mr. Taul attempts to bolster his position and support his arguments with matters that, while part of the record below, were not before the trial court before or at the time of the appealed decision and do not find themselves anywhere in the trial court's findings. Br. of Resp. at 17-19, 25, 30. For example, Mr. Taul cites the after-the-fact affidavit that domestic violence victim Ms. Anderson[1] filed in support of his cause, but that affidavit had no bearing on the trial court's decision and, thus, cannot be used to support it. This court should decline to entertain evidence not presented to the trial court.

I. THE STATE DID NOT WAIVE ANY POTENTIAL ISSUE AS TO NOTICE

Mr. Taul argues that the State waived its right to proper notice by conduct. Br. of Resp. at 21-26. Implicit in this argument is the acknowledgment that the State *did not* receive proper notice. Regarding waiver Mr. Taul argues:

> "[p]erhaps most significantly, however, the court agreed to hear [the State's] motion to reconsider and scheduled a

[1] Moreover, given the nature of the relationship between Mr. Taul and Ms. Anderson and the direction of the court proceedings below, the affidavit's accuracy should not be assumed.

> hearing. But [the State] withdrew the motion, opting instead to take her chances with this Court. The [S]tate should not be allowed to now argue it was not afforded a full and fair opportunity to litigate the motion to dismiss. That ship has sailed."

Br. of Resp. at 25-26. Absent in the above argument, however, is any citation to legal authority. In fact, Mr. Taul provides no support for his legal theory that to preserve an issue for appeal a party must file a motion to reconsider with the trial court, or that if a motion to reconsider is filed, that the withdrawal of the motion precludes a party from raising an otherwise preserved legal issue with this court. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (quoting *DeHeer v. Seattle Post–Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)); *State v. Dow*, 162 Wn.App. 324, 331, 253 P.3d 476 (2011). Thus, the court should pay no heed to this argument of Mr. Taul's.

Additionally, Mr. Taul argues that his failure to give proper notice should be forgiven because "the prosecutor was afforded a full and fair opportunity to repudiate the allegation she misled the court, which was the basis of the motion" and because "the issue was a question of fact. . . ." Br. of Resp. at 21, 24-25. The first assertion misunderstands what the State should have been provided a full and fair opportunity to address and is,

nonetheless, belied by the record, and the second assertion mischaracterizes the issue.

First, a CrR 8.3(b) hearing is not held to determine only whether, factually, some kind of misconduct occurred, rather the misconduct in question must be misconduct under the law. *See State v. Wilson*, 149 Wn.2d 1, 9-12, 65 P.3d 657 (2003) (holding that the prosecutors did not commit misconduct under CrR 8.3(b) when they failed to comply with the trial courts' orders to produce witnesses for interview by the court-imposed deadlines); *State v. Blackwell*, 120 Wn.2d 822, 831-832, 845 P.2d 1017 (1993). Second, if in fact the court finds that the State engaged in misconduct, it must determine whether that misconduct prejudiced the defendant, i.e., whether the misconduct "materially affected the rights of the accused to a fair trial." *State v. Rohrich*, 149 Wn.2d 647, 653, 71 P.3d 638 (2003) (quotation and citation omitted). Finally, if the trial court finds misconduct and prejudice it must consider intermediate remedies prior to dismissing the case. *State v. Koerber*, 85 Wn.App. 1, 3, 931 P.2d 904 (1996); *City of Seattle v. Holifield*, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010).

Given, as shown above, the findings a trial court must make and legal analysis it must engage in at a CrR 8.3(b) hearing, the issue before

the trial court was not just a "question of fact," nor was "the prosecutor . . . afforded a full and fair opportunity to repudiate the allegation she misled the court, which was the basis of the motion." Here, the State was left to argue from its memory and without the assistance of the relevant case law or the opportunity for deliberation. The State was placed in this position because Mr. Taul's untimely motion to dismiss was handed to the court and State after the start of what was supposed to be a jury trial and contained no analysis of CrR 8.3(b) and no case law applying the rule.

State v. Heddick, 166 Wn.2d 898, 215 P.3d 201 (2009) and *State v. Myers,* 86 Wn.2d 419, 545 P.2d 538 (1976) offer Mr. Taul no support. Neither case is procedurally or factually similar to this one. Here, on the day of the trial with all the material witnesses available and with the defense previously opposed to any continuances of the trial date, the resolution of the CrR 8.3(b) motion was realistically, if not necessarily, a condition precedent to proceeding to the jury trial. Consequently, the State did not waive the issue of notice when it attempted to responds to Mr. Taul's allegations. Moreover, perhaps the best evidence that the State did not receive a "full and fair opportunity" to address the legal issues involved in the motion to dismiss is that the trial court's 15 page findings, which include 57 findings of fact, 4 conclusions of law with numerous

subparts, and spans 15 pages, do not include a citation to one relevant case or the legal standards for applying CrR 8.3(b). CP 17-31.

II. THE COURT FAILED TO FIND MISCONDUCT UNDER CrR 8.3(b) AND THE STATE DID NOT ENGAGE IN MISCONDUCT

a. The Findings

Under CrR 8.3(b) "a defendant *must*" show by a preponderance of the evidence that the government engaged in misconduct or arbitrary action. *State v. Barry*, 184 Wn.App. 790, 797, 339 P.3d 200 (2014) (emphasis added); *Rohrich*, 149 Wn.2d at 654 (citations omitted). Reviewing courts must presume that the party with a burden of proof cannot sustain their burden on an issue when there is an "absence of a finding on [that] factual issue." *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 180 (1997); *State v. Cass*, 62 Wn.App. 793, 795, 816 P.2d 57 (1991) ("When there is an absence of a finding on a factual issue, it is presumed that the party with the burden of proof failed to sustain their burden on this issue.") (citing *Smith v. King*, 106 Wn.2d 443, 451, 722 P.2d 796 (1986)).

Mr. Taul claims that the State's argument that the trial court failed to find misconduct under CrR 8.3(b) "is specious, as the record clearly demonstrates the court found misconduct . . ." and that "*Armenta* is inapplicable." Br. of Resp. at 26-28. The State readily concedes that the court was unhappy with the State and that it felt it was "led . . . to believe

whether intentionally or not that the alleged victim complaining witness was ready willing [sic] able to testify and scheduled to appear" on September 29 when whether she was going to show up to testify was unknown to the State. CP 29, CL #2 (emphasis added). But the court's feelings on the matter, or aggravation with the State, do not constitute the necessary finding of misconduct under CrR 8.3(b) or transform a legitimate continuance—on the basis of the last-minute unavailability of a material witness[2] at the first trial setting with about 30 days remaining in Mr. Taul's speedy trial period—into a continuance with no basis in the law. The trial court entered 57 findings of fact and 4 conclusions of law with numerous subparts, but not one of them explicitly finds the misconduct that it was required to find under CrR 8.3(b) and without such a finding *Armenta* controls notwithstanding Mr. Taul's *ipse dixit* that the case is inapplicable.

b. Substantial evidence does not support the trial court's findings

Here, on September 29, every attempt the State made to address an issue that deviated from the availability of the officer was cut-off by the trial court who continued to insist that that was the only issue he wanted

[2] Neither the trial court nor Mr. Taul has asserted that the investigating officer was not actually sick or unavailable for trial on September 29. Regardless of Ms. Anderson's availability, the State would have had to request a continuance on the basis of the unavailable officer.

the parties to discuss. *See* RP 2-36. Moreover, Mr. Taul's assertion that "[t]he bottom line is that [the State] made it seem as if Anderson's testimony was assured" is not supported by the record[3]. Br. of Resp. at 30. The following excerpts show that despite the State's best efforts, the trial court would not let her make a record on the issue about which it would later complain that she failed to address:

> [STATE]: *If I might make a record* as to the discussion. I was the person who spoke to - -
>
> THE COURT: Hold on - -
>
> [STATE]: Ms. Green today.
>
> THE COURT: Hold on. One thing at a time, you guys are jumping [to] too many things.

RP 9-10 (emphasis added).

> THE COURT: Very well. So the next matter is the continuance based upon the unfortunate illness of the investigating officer; is that correct?
>
> [STATE]: Correct, Your Honor. *If I might just make a brief record.* I was the person who spoke to the alleged victim's mother.
>
> THE COURT: I'm not going to get into what he-said/she-said –
>
> [STATE]: Okay.

[3] Additionally in a domestic violence case it is common knowledge that victims are often reluctant witnesses and frequently fail to show up for trial whether or not they are subpoenaed.

> THE COURT: -- I want to stick to the legal arguments with respect to –
>
> [STATE]: I just wanted to make –
>
> THE COURT: -- the continuance.
>
> [STATE]: Okay.

RP 11 (emphasis added).

> THE COURT: Is the alleged victim here and will she be testifying today?
>
> [STATE]: I told them to wait until we called them to let them know, Your Honor, *but I* –
>
> THE COURT: Very well. Hold on, so -- And then you indicate that the victim, alleged victim may have had a couple inconsistent statements regarding this matter?
>
> [STATE]: The defendant, Your Honor.

RP 26 (emphasis added).

Essentially, on September 30, the trial court complained about the State's failure, on September 29, to put on the record that which it explicitly prevented her from putting on the record. This cannot be disputed as even Mr. Taul conceded that "regarding the record, I would agree that I think [the State] intended to put other stuff on the record and she wasn't allowed to." RP 63. The following example is illustrative of the problem, on September 30 the court stated:

> THE COURT: You could have told me that yesterday, counsel.
>
> [STATE]: And I apologize, Your Honor, I didn't know –
>
> THE COURT: You could have said –
>
> [STATE]: -- that that was the question.
>
> THE COURT: You could have said yesterday that we don't know if she's gonna show up. That's what you could have said: I don't know if she's gonna show up.

RP 53. But the State could not tell the court that because it would not let her. Moreover, the State was not in a position on September 29 to know what the trial court "was led to believe" regarding the issue of Ms. Anderson's service or availability because the State could not know the court's unstated beliefs. RP 54. It cannot be misconduct for the State to fail to correct the trial court's unstated beliefs when it was prohibited from making a record of any kind regarding the issues underlying those beliefs.

Furthermore, on September 29, Mr. Taul made his complaints about the lack of service of Ms. Anderson and the other lay witnesses, but the trial court's interest was elsewhere as is evident by the record. RP 7-8, 11-36. Consequently, the court was only led to believe what it ended up believing because it would not allow the State to make a record and/or because it was not interested in hearing about the other witness issues on September 29. This lack of interest in other issues in unsurprising given

that there was a valid basis on which to grant a continuance. As a result, if there was a finding of misconduct it rested on untenable grounds.

III. THE COURT'S FINDING OF PREJUDICE IS NOT SUPPORTED BY THE RECORD NOR DOES ITS ARTICULATION OF PREJUDICE FIND SUPPORT IN CASE LAW

Mr. Taul argues that *State v. Duggins,* 68 Wn.App. 396, 401, 844 P.2d 441 (1993) is inapposite because the case "did not address the trial court's discretion to dismiss a charge when the prosecutor makes misleading statements to the court." Br. of Resp. at 32. But that argument confuses the analysis: *Duggins* is on point and is cited by the State because of its analysis of *what* constitutes prejudice. That analysis is not dictated by whether or not, or what type of, misconduct occurred. And *Duggins* is straightforward:

> prejudice to a defendant means there is some *interference with his ability to present his case*, for example, the unavailability of a witness or some substantial additional time in custody awaiting trial. *It does not mean* merely that if the case went to trial without the continuance, the defendant might be acquitted because of the absence of the witness."

Duggins, 68 Wn.App. at 398-402 (emphasis added).

Duggins is completely controlling on the issue of whether Mr. Taul suffered prejudice under the case law; he did not. Mr. Taul's three attempts to distinguish *Duggins* from his case are each unavailing in their

own way. First, Mr. Taul argues that in his case "the [S]tate would not have been able to proceed at all" because of subpoena service issues[4] unlike in *Duggins* where "the defendant might [have been] acquitted because of the absence of [a] witness." Br. of Resp. at 33. This is a distinction without a difference and without citation to legal authority or support in the record. For one, because prejudice is determined by whether the continuance *caused* "some interference with his ability to present his case," the degree of likelihood of an acquittal if the case proceeded to trial without the continuance is irrelevant.

Furthermore, the record is clear that the State was in communication with its officer, its bail jump witness, and the victim's mother, Ms. Green. *See generally* RP. Consequently, if forced to trial on September 29, the State could have at least selected a jury and began a bail jump trial. And depending on the health of the officer or the amenability of Ms. Green, they could have perhaps started to call witnesses on the domestic violence charges that day or recessed until the next day to continue the trial if it got late. While acknowledging from the record the State could have elected to just proceed to trial on the bail jump, or may have been only able to proceed on that charge, the above speculation is as

[4] It is worth noting that the personal service of a subpoena is not a prerequisite for taking the stand and testifying and that witnesses can and do show up on their own accord even if there are technical defects in the subpoena or the service of it.

good as Mr. Taul's. Either way, certitude is lacking, and thus, to the extent that the likelihood an acquittal is involved in the prejudice calculus there is no meaningful distinction to be drawn between Mr. Taul's case and *Duggins*.

Second, Mr. Taul argues that "the finding of prejudice should be affirmed because the [S]tate was able to strengthen its case against Taul. . . because it allowed the [S]tate time to secure the complainant's presence at trial. Thus, it did affect Taul's ability to defend against the charge." Br. of Resp. at 33. But, once again, *Duggins*, and other cases are clear, "prejudice to a defendant means there is some interference with his ability to present his case." *Duggins*, 68 Wn.App. at 401; *State v. Chichester*, 141 Wn.App. 446, 457, 170 P.3d 583 (2007); *City of Kent v. Sandhu*, 159 Wn.App. 836, 841, 247 P.3d 454 (2011). This is not the same thing as his "ability to defend against the charge" being affected because a witness to the crime testifies, and it does not distinguish his case from *Duggins* where the State was allowed time to secure its witness's presence at trial despite the fact that he was not subpoenaed and failed to show up for the first scheduled trial date. This argument is just a repackaged version of the argument that the he could have been acquitted of the domestic violence counts had the continuance been denied on September 29, which *Duggins* categorically rejects.

Finally, Mr. Taul attempts to distinguish *Duggins* by arguing that *Duggins* involved the "'[d]raconian penalty' of dismissal of charges with prejudice. The same concern is not present here." Br. of Resp. at 33 (quoting *Duggins*, 68 Wn.App. at 398). This attempt misses the mark as, straightforwardly, the type of remedy requested or imposed is not relevant to whether a defendant actually suffered prejudice due to the alleged misconduct. Consequently, this argument does not advance Mr. Taul's contention that the trial court did not err when it found he was prejudiced. Moreover, on September 30, the court dismissed the domestic violence counts of Mr. Taul's case with prejudice. CP 13. Significantly, it was this order dismissing the counts with prejudice that the State appealed. CP 14-15. The last minute addition to the findings indicating a dismissal without prejudice does not, and cannot, change the fact that the counts were already dismissed with prejudice and the State had already appealed that order.

In sum, Mr. Taul fails to distinguish *Duggins* and fails to otherwise explain how his ability to present his case was prejudiced by the one day continuance. Accordingly, the trial court abused its discretion when it found prejudice in direct contravention of *Duggins* and the case law defining prejudice.

IV. THE COURT ABUSED ITS DISCRETION WHEN IT DISMISSED THE DOMESTIC VIOLENCE COUNTS AND ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER INTERMEDIATE REMEDIES

Dismissal under CrR 8.3 is "an extraordinary remedy to which the court should resort only in truly egregious cases of mismanagement or misconduct" by the prosecutor. *State v. Wilson,* 149 Wn.2d 1, 9, 65 P.3d 657 (2003) (citation omitted); *Holifield*, 170 Wn.2d at 237 ("Dismissal is an extraordinary remedy, one to which a trial court should turn only as a last resort.") (citation and internal quotations omitted). Notably, a trial court "abuse[s] its discretion by resorting to the extraordinary remedy of dismissing a criminal charge without first considering intermediate and less drastic remedial steps." *Koerber*, 85 Wn.App. at 3.

Notably, Mr. Taul does not try to argue that this case is one of the "truly egregious cases of mismanagement or misconduct" by the State for which the dismissal remedy is reserved. Br. of Resp. at 34-37. He cannot; it is not. On this basis alone, the trial court abused its discretion in dismissing the case.

Instead, Mr. Taul argues that alternative remedies, in his opinion, "would have been a poor remedy for the [S]tate's misconduct" due to defense counsel's "busy . . . schedule . . .," or would ultimately lead to same result. Br. of Resp. at 34-35 (discussing exclusion of a witness or

evidence, release from custody, and a continuance). In addition, while Mr. Taul acknowledges that *Koerber* held that "it was an abuse of discretion for the court in that case not to have considered less drastic measures, the trial court there dismissed the case with prejudice." He argues "[t]hat is not the case here." Br. of Resp. at 36. As noted above, the counts in this case were dismissed with prejudice pursuant to court order just after the CrR 8.3(b) hearing and the State appealed that court order. CP 13-15.

Nonetheless, regardless of whether the dismissal was with or without prejudice, Mr. Taul provides no case law and cites no authority for the idea that there are alternative modes of analysis depending on the kind of dismissal under CrR 8.3(b). Moreover, as our Supreme Court in *Wilson* (consolidated cases with 3 co-defendants) explains, the consideration of intermediate steps prior to dismissal is not something an aggrieved party is obligated to raise, rather it is the court's duty at time of the motion:

> Finally, dismissal under CrR 8.3 is an extraordinary remedy, one to which a trial court should turn only as a last resort. The trial judge in each case ignored "intermediate remedial steps" when it ordered the "extraordinary remedy of dismissal." Because Irons was not in custody and his speedy trial expiration was not imminent, his case should not have been dismissed until speedy trial expiration became an issue. Furthermore, the trial court could have ordered Wilson and Taylor released in order to extend the speedy trial expiration from 60 to 90 days, giving the prosecutors more time to arrange interviews with the now cooperating witnesses. Although release may not be ideal, such an intermediate step should have been attempted

> before resort to the extraordinary remedy of dismissal. Alternatively, this court has allowed exclusion of a witness's testimony as a sanction for a discovery violation. Thus the trial court should have also considered the less extreme alternative of excluding Paul's and Seise's testimony, rather than dismissing the cases altogether.

Wilson, 149 Wn.2d at 12 (citations and footnote omitted). Thus, the court here abused its discretion when it failed to consider intermediate steps prior to dismissal.

B. CONCLUSION

This court should reverse the trial court's order dismissing the domestic violence counts.

DATED this 22 day of July, 2015.

Respectfully submitted:

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